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No. 236

In the Supreme Court of the United States

OCTOBER TERM, 1956

GULF REFINING COMPANY, PETITIONER

versus

ISAAC R. PRICE, ET AL., RESPONDENTS

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF LOUISIANA, ON BEHALF OF THE STATE OF LOUISIANA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI FILED BY GULF REFINING COMPANY.

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ERRATA

To

BRIEF No. 236

In The

SUPREME COURT OF THE UNITED STATES

October Term 1956

GULF REFINING COMPANY, *Petitioner*

vs.

ISAAC R. PRICE, ET ALS, *Respondents*

Page 32, third line from bottom:

delete:

"of the Civil Code, which reads as follows:"

add:

of interversion of possession.

Page 34, top line

delete:

"not"

SYLLABUS

INTEREST OF THE STATE OF LOUISIANA

I. Interest of the State of Louisiana

A. Respondents assertion of title herein, is predicated upon a Patent alleged to have been issued from the State of Louisiana, which Patent has been, and is presently, incidentally involved in litigation between the State of Louisiana and Respondents, such litigation clearly indicating the ultimate necessity of a title action between the State of Louisiana and Respondents. Hence, the State of Louisiana is vitally interested in any judgment rendered in the Federal Court against its sublessee, petitioner herein, and which would disturb or affect the State's possession of the property in dispute.

California Co. v. *Price, et al.*, 225 La. 706, 74 So2d 1.

The California Co. v. *Isaac R. Price, et al.*, No. 42,714, Docket of Supreme Court of Louisiana (Unreported, pending for a decision).

Articles 5, 43 and 44 of the Louisiana Code of Practice.

Articles 3433, 3441, and 3501, Revised Civil Code of Louisiana.

B. One of the most important sources of revenue to the State of Louisiana, is income from oil and gas leases granted on lands owned by the State. Hence the State is vitally interested in any decision in the Federal Courts, which permits a title action to be

prosecuted against one of its mineral lessees *alone*, and without joinder of the State of Louisiana as an indispensable party.

ARGUMENT

II. Argument

A. Introductory Statement

B. The decision of the court below is in conflict with its decision in the case of "*The Leiter Minerals, Inc.* v. *United States of America, et al.*," 224 Fed 2d 381, Certiorari granted 27th day of February, 1956, 350 U. S. 964. Accordingly, the writ should be granted to allow a consideration of both cases at the same time.

The Leiter Minerals, Inc. v. *United States of America, et al*, 224 Fed 2d 38, certiorari granted, 350 U. S. 964. No. 616 on the Docket of the Supreme Court, October term, 1955.

C. Indispensability of Absent Parties Must Be Determined By Federal Law Rather Than Local Law.

Lawrence v. *Sun Oil Co., et al*, 166 Fed 2d 466. (C. C. A. 5th).

Sheilds v. *Barrow*, 17 How. 130, 15 L. Ed. 158.

Erie R. Co. v. *Thompkins*, 304 U. S. 64, 58 S. Ct. 817, 83 L. Ed. 1188.

Linkenhager v. *Owens*, 181 Fed 2d 97 (C. C. A. 5th).

Mass. and So. Const. Co. v. *Cane Creek Township*, 155 U. S. 283.

D. The State of Louisiana has possession of the property in dispute, hence respondents are entitled to no relief as respects (1) possession, or, (2) an adjudication of title.

Lawrence v. *Sun Oil Co.*, supra.
Articles 5, 43, 44, 46, 47, 48, 49, 53, 54, 55, Louisiana Code of Practice.

Verdun v. *Gilmore*, 128 La. 1063, 55 So 675.
Articles 3426, 3435, 3436, 3438, 3449, 3450, 3454 and 3455 of the Revised Civil Code of Louisiana.

Smith v. *Grant Timber & Mfg. Co.*, 130 La. 471, 58 So 153.

Labarre v. *Burton-Swartz Cypress Co.*, 126 La. 982, 53 So 113.

Lawrence v. *Sun Oil Co.*, supra.
Articles 3433, 3438, and 3441 of the Revised Civil Code of Louisiana.

Mass. and So. Construction Co. v. *Cane Creek Township*, supra.

Linder v. *Yazoo and M. V. R. Co.*, 116 La. 262.

Bossier's Heirs v. *Jackson*, 114 La. 707, 38 So 525.

E. The Court below was in error in holding that petitioner's continued possession was not in the character of a lessee, and further that Article 43 of the Code of Practice only applies where the lessor-lessee relationship exists.

Article 43 of Louisiana Code of Practice. *Cortinas* v. *Peters*, 224 La. 9, 68 So 2d 739.

Articles 3441, 3446, and 3433 of the Revised Civil Code of Louisiana.

Scott v. *Bowles*, 3 La. Ann. 637.

CONCLUSION

III. Conclusion

Revised Statutes of Louisiana, Title 30, Sec. 121.

State v. *Texas Co.*, 205 La. 417, 17 So 2d 569.

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I. INTEREST OF THE STATE OF LOUISIANA

May it please the court:

The interest of the State of Louisiana in this litigation is two-fold:

A. Petitioner herein, Gulf Refining Company, (defendant-appellant below) was an oil, gas and mineral sub-lessee of the State of Louisiana. Respondents, Isaac

R. Price, et al, (plaintiff-appellee) instituted this suit, a petitory action (title action), against the sub-lessee of the State of Louisiana, Gulf Refining Company, *without joinder of the State of Louisiana*, or its agency the State Mineral Board, *as a party defendant*. The assertion of title by Respondents herein was predicated upon, and emanated from, an alleged patent, purportedly issued by the State of Louisiana as Patent No. 1965. This same patent was *incidentally* involved in an interpleader or concursus proceeding, to which these Respondents, on the one hand, and, the State of Louisiana on the other hand, were parties defendant, the suit being entitled "*California Company* v. *Price, et al*", 225 La. 706, 74 So 2d 1, decided by a divided Court, on rehearing, May 31, 1954. The suit before this Court, a title action, was filed *the day after* a second such interpleader, or concursus proceeding, was filed by the California Company, entitled "*The California Company* v. *Isaac R. Price, et al*", in which the same parties were named parties defendants, as those involved in the case of "*California Company* v. *Price*," supra. In this latter case, as in the first case, Patent No. 1965 is incidentally involved. This latter case has been appealed to the Supreme Court of Louisiana, "*The California Company* v. *Isaac R. Price, et al*", No. 42,714 on the Docket of that Court, and is presently pending before that Court for a decision.

Inasmuch as these interpleader suits are not determinative of title, it is apparent that a title action between the State of Louisiana and Respondents will be

necessary in order to finally determine the question of title as between them. Despite this fact, as above stated, Respondents instituted this title action *the day after* the second above referred to interpleader or concursus action was filed, but in doing so Respondents did not sue the State of Louisiana, or its agency, the State Mineral Board, but instead sued *only* the mineral sublessee of the State of Louisiana.

Under the law of Louisiana, the *type* of title action is dependent upon the possession of the property involved. Where one of the parties is in possession, the other party must resort to a petitory action, which is defined under our law by Articles 5 and 43 of the Code of Practice, as follows:

> "*Article* 5. Petitory actions—The petitory action is that by which he who has the property of a real estate, or of a right upon or growing out of it, proceeds against the person have the possession, in order to obtain the possession of the immovable property, or the enjoyment of the rights upon it, to which he is entitled."
>
> "*Article* 43. Parties defendant—Lessee's duty to declare name of lessor.—The petitory action, or one by which real property, or any immovable right to such property may be subjected, is claimed, must be brought against the person who is in the actual possession of the immovable, even if the person having the possession be only the farmer or lessee.
>
> But if the farmer or lessee of a real estate be sued for the cause of action, he must declare to the plaintiff the name and the residence of his lessor, who

shall be made a party to the suit, if he reside in the State, or is represented therein, and who must defend it in the place of the tenant, who shall be discharged from the suit."

The possessor and defendant in a petitory action has several advantages as evidenced by Article 44 of the Code of Practice, as follows:

"*Article* 44. Plaintiff required to prove title.—The plaintiff in an action of revendication must make out his title, otherwise the possessor, whoever he be, shall be discharged from the demand."

Under the law of Louisiana, a lessee or sub-lessee does not possess *for himself*, but possesses for his lessor, as provided by Articles 3433 and 3441 of the Civil Code, as follows:

"*Article* 3433. Constructive possession.—One may possess a thing not only by one's self, but also by other persons.

Thus the proprietor of a house or other tenement possesses by his tenant, or by his farmer; the minor, by his tutor; and, in general, every proprietor, by the persons who hold the thing in his name."

"*Article* 3441. Possession held for another—Possessor barred from acquiring legal possession.—Those who possess, not for themselves, but in the name of another, as farmers, depositaries and others who acknowledge an owner, can not acquire the legal possession, because, at the commencement of their possession, they had not the intention of possession for themselves but for another."

From the foregoing it can therefore be seen that the State of Louisiana is vitally interested in the judgment rendered herein adjudging Respondents to have title, as against the State's sub-lessee, for such a judgment entitles them to a writ requiring petitioner to remove the structures located upon the disputed property. Whereas such structures are evidence of the continuous possession of the property by the State of Louisiana, for as provided in Article 3501 of the Revised Civil Code:

> "Acts evidencing intention to preserve possession. —The possession necessary for this species of prescription, when it has commenced by the corporal possession of the thing, may, if it has not been interrupted, be preserved by external and public signs, announcing the possessor's intention to preserve the possession of the thing, as the keeping up of roads and levees, the payment of taxes, and other similar acts."

B. Aside from the fact that the State of Louisiana is directly interested in not having its possession, through its sub-lessee, of the disputed property disturbed and ousted, the State is even more vitally interested in any decision which permits its mineral lessee or sub-lessee to be sued in a title action, without a joinder of the State as an indispensable party.

One of the most important sources of revenue for the State of Louisiana, is from the bonuses, delay rentals and royalties from its mineral leases. Thus Article 4, Section 2 of the State Constitution provides

that ten per cent (10%) of the royalties from State leases shall go into a "Road Fund" to the credit of the Parish wherein the property is located. Article 4, Section 2 (a) authorizes the Board of Liquidation of the State Debt to fund into bonds, the minimum royalties from State leases, not to exceed $5,000,000.00, in order to provide funds for the construction, improvements and repair of certain correctional and charitable institutions. Article 4, Section 2 (b) provides that all revenues obtained from minerals beyond a three-mile limit of the Coastal Waterways of the State are dedicated to the retirement of existing bonded indebtedness of the State of Louisiana. Article 4, Section 2, (c) (1), provides for a payment annually, of $12,500,000.00 into the General Highway Fund, from royalties derived from State leases. Article 4, Section 2, (c), (2), provides for an additional annual payment of $2,500,000.00 into the General Highway Fund.

Thus the State of Louisiana is vitally interested in any decision or precedent which permits a title action to be instituted against one of its lessees or sub-lessees, without a joinder of the State, or its agency the State Mineral Board, as an indispensable party, for any such decision or precedent will open the door to such suits, and make every lessee of the State of Louisiana, prey to a suit in the Federal Court, without a joinder of the State, or its agency the State Mineral Board, as an indispensable party.

II. ARGUMENT

A. Introductory Statement.

The Court below rendered an opinion dated February 2, 1956; however, after the filing of an application for a rehearing, by a most extraordinary and unusual procedure, this opinion as summarily recalled, and an entirely different opinion, of date April 6, 1956, was substituted therefor. Presumably it is this latter opinion which now prevails. However, it will be necessary to refer to the withdrawn opinion, for the illuminating effect which it has, as respects the later opinion.

Additionally, while the State of Louisiana considers that the Court below was erroneous in several instances, yet these were with reference to matters not germain to the interests of the State of Louisiana, and hence they will not be referred to, except to the extent necessary in presenting matters of interest to the State.

B. The Decision Of The Court Below Is In Conflict With Its Decision In The Case Of "*The Leiter Minerals, Inc.* v. *United States of America, et al*", 224 Fed 2d 381, Certiorari Granted 27th Day Of February, 1956, 350 U. S. 964, No. 616 On The Docket Of The Supreme Court, October Term, 1955. Accordingly, The Writ Should Be Granted To Allow A Consideration Of Both Cases At The Same Time.

The Leiter case, supra, is the direct converse of the case at bar. Thus, the plaintiff in that case brought a petitory action (title action) in the State Court, against The California Company, who was an oil, gas

and mineral sub-lessee of the United States of America. The United States of America in turn instituted suit in the Federal Court, against The Leiter Minerals, Inc., seeking to quiet title to the land involved, and asking that the State Court action be enjoined, 127 Fed. Sup. 439. The injunction was granted by the District Court, and the granting thereof affirmed, on the ground that the U. S. A. was a necessary and indispensable party to any proceeding to adjudicate title to the property, 224 Fed 2d 381.

Such is precisely the case at bar. Here the Respondents instituted a petitory action (title action) in the Federal Court, against defendant *alone*, who was an oil, gas and mineral sub-lessee of the State of Louisiana, without joinder of the State of Louisiana, the lessor and claimant of the title to the property.

The Court below, in its opinion of February 2, 1956, (later withdrawn), entirely contrary to the position taken by it in the Leiter case, held that the State of Louisiana was not a necessary and indispensable party, saying:

> "As stated earlier, the State, if it has any rights, has lost nothing and if it sees fit to sue plaintiffs in this case for recovery of the property involved, issue can be joined and determined in a manner that will be binding upon all concerned."

In complete disregard of the rule that indispensability of parties is governed by Federal Law, rather than State Law (as shall be demonstrated hereafter), the

Court relied upon a State Court decision (erroneously, as shall be demonstrated hereafter).

This Court granted a writ of certiorari in the Leiter case, supra, *after* the decision of February 2, 1956, was called to its attention and prior to its subsequent withdrawal. Had this opinion remained, a granting of a writ in this case would have been mandatory. The unexplained withdrawal of the opinion of February 2, 1956, and substitution of the opinion of April 6, 1956, occurred only *after* this Court had granted the writ in the Leiter case. A comparison of the changes made in the later opinion, shows that the Court was attempting to eliminate the apparent conflict between its first decision and the decision in the Leiter case, necessarily forcing the conclusion that the granting of the writ by this Court in the Leiter case, was the reason for the withdrawal and substitution of the opinion in this case.

As we shall demonstrate hereafter, the Court below failed to eliminate the conflict between its decision herein and the decision in the Leiter case, supra. Accordingly, a writ should be granted in this case, in order that the two cases might be considered together.

In any event, it is apparent from the granting of the writ in the Leiter case, that this Court intends to give consideration to the question of indispensable and necessary parties, and to say the least, this case involves one highly important and closely related aspect of that subject.

* * *

In attempting to avoid the effect of the indispensability of the State of Louisiana in this case, the Court below, in its opinion of April 6, 1956, stated:

> "The appellant's claim of error, (based upon the absence of an indispensable party) is predicated upon the assumption that a lessor-lessee relationship is present in this case. This is not so. True, when the complaint was filed, the appellant had a right to answer, claiming possession as a lessee, and thus to avail itself of the right provided by Art. 43, La. Code of Practice, to require that the suit be litigated with its lessor, whomever that might be, and be dismissed from the suit. But the defendant elected not to appear in this action as lessee, but instead denied possession and disclaimed any title to the property in question. In all of the cases cited by appellant in support of its claim that its "lessors" were indispensable parties to the suit, there was in existence an alleged lessor-lessee relatioiship, whereas here, the record shows that appellant not only disclaimed any rights to the land, but effectively re-leased its rights under a lease, and no lessor-lessee relationship exists between the defendant and any other party. It cannot be said that where defendants are not sued as and do not appear as lessees, that the rights granted by Art. 43 of La. Code of Practice can be availed of, or that any rights of any lessor can be affected if the litigation involves none of its lessees. (See *Lawrence* v. *Sun Oil Co.*, 166 F. 2d 466, for discussion of Art. 43 and indispensable parties)."

The foregoing was followed by a finding that "plaintiff proved its *prima facie* title to the lands in Sections

22 and 27 against Gulf who was in possession of said sections but claimed no title thereto."

This second and reformed finding is again in error, and will have to be again reformed, in that plaintiffs claim of title extends *only* to a portion, some 240 acres, and not to the entire 640 acres of Section 27.

Thus the Court held (1) that the defendant, Gulf, by its *unilateral action*, could change the character of its possession from that of a lessee, presumably to that of a trespasser; (2) that the test of indispensability in the Federal Courts is controlled by State Court decisions, and, (3) that under State Court decisions it is only where the lessor-lessee relation exists, that the party for whom the "precarious" possessor is in possession, is an indispensable party.

The Court below was in error in each instance.

C. Indispensability of Absent Parties Must Be Determined By Federal Law Rather Than Local Law.

In support of this principle, one need go no further than the decision of the Court below in the case of *Lawrence* v. *Sun Oil Company, et al*, 166 Fed. 2d 466, where the Court said:

> "Procedure in the federal courts is governed by the Federal Rules and not by the local law. 17 Hughes, Federal Practice Jurisdiction & Procedure, P. 18518. This is particularly true in diversity cases where the question of indispensability of absent parties arises. It is now settled we think that in such

cases the rule as to indispensability of absent parties must be determined by federal rather than by local law. *De-Korwin* v. *First National Bank of Chicago*, 7 Cir., 156 F. 2d 858; *Chicago, M., St. P & P. R. Co.* v. *Adams County, et al*, 9 Cir., 72 F. 2d 816.

"In an early case, the Supreme Court of the United States, *Shields* v. *Barrow*, 17 How. 130, 139, 15 L. Ed. 158, said:

> 'Persons who not only have an interest in the controversy but an interest of such nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience (are indispensable parties.)***'

"Since then, in numerous adjudications it has been held that the test of indispensability is whether the absent party's interest in the subject matter of the litigation is such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the rights of the absent party."

In applying the foregoing test of indispensability, local law is pertinent or relevant only for the purpose of determining what the substantive rights of the parties before the Court will be, as well as what the substantive rights of the absent party will be, all in light of the relief sought. Other than this, local law is applicable or pertinent to the extent that the Federal Court *might allow relief*, which would not be allowed under local law, which would be contrary to the deci-

sion in the case of *Erie R. Co.* v. *Thompkins*, 304 U. S. 64, 58 S. Ct. 817, 83 L. Ed. 1188, as recognized by the Court below, in the case of *Linkenhager* v. *Owens*, C. C. A. 5th, 181 Fed. 2d 97, 99, when it said:

> " . . . The Command of Erie R. Co. v. Thompkins, 304 U. S. 64, 58 S. Ct. 817, 83 L. Ed. 1188, 114 A. L. R. 1487, is that the ultimate results reached in Federal Courts predicated upon causes of action arising from the State law, must be the same as if the litigation has been conducted in the State courts."

Considering that portion of the test of indispensability which provides "that its final determination may be wholly inconsistent with equity and good conscience," the basic rule is an avoidance of a "multiplicity of suits" and the unwillingness of Courts to decide a controversy "piecemeal". Yet a consideration of local law shows that the effect of this decision is to decide the matter piecemeal.

Considering that portion of the test of indispensability which relates to the final decree effecting the rights of the absent party (State of Louisiana), local law shows that such is precisely the effect of the Court's decision.

Additionally, local law demonstrates conclusively that Respondents have obtained a judgment or decree, although they have no right or cause of action to such relief under local law.

The Court's error stemmed from a failure to appreciate the nature of a petitory action in Louisiana, *par-*

ticularly as it relates to the other real actions authorized by the law of this State. However, before considering the law of Louisiana, as respects the issues involved and the decision of the Court below, in connection with the question of indispensability, we cite the decision by this Court, in the case of *Mass. and So. Const. Co.* v. *Cane Creek Township*, 155 U. S. 283, at Page 285:

> "The *substantial object of the suit was to obtain possession of the bonds. The Deposit and Trust Company was the party in possession*, and, although it claimed no interest in the bonds as against the plaintiff and its codefendant, *yet possession could not be enforced in favor of the plaintiff except by a decree against it. Where the object of an action or suit is to recover the possession of real or personal property, the one in possession is a necessary and indispensable* (and not a formal) *party.* The case of *Wilson* v. *Oswego Township* 151 U. S. 56, is decisive on this point."

* * *

D. The State of Louisiana Has Possession of The Property In Dispute, Hence Respondents Are Entitled To No Relief As Respects (1) Possession, or, (2) An Adjudication of Title.

The Court below, in the case of *Lawrence* v. *Sun Oil Co.*, supra, said with reference to a petitory action under the law of Louisiana:

> " . . . A petitory action has for its purpose not only the establishment of title by the owner out of

possession *but through court decree the obtaining of possession . . .* " (166 Fed. 2d 470)

It was in keeping therewith that Respondents in the complaint prayed for judgment "recognizing petitioners as the true and lawful owners of said property and, as such, entitled *to the full and undisturbed possession thereof* and ordering said Gulf Refining Company *to deliver possession* of said property *to petitioners.*" (See Page 2 of the Opinion of the Court below, dated April 6, 1956.)

For a consideration of the law of Louisiana, *it is important to note that there was no claim for damages, but only possession was sought* by Respondents.

While the Respondents entitled their suit as "Petition To Assert Title And To Eject Trespasser," yet the suit as drafted was in fact a petitory action, as admitted by counsel on argument in the Trial Court:

"Mr. Liskow:

Your Honor, this was fixed . . . the first fixing was on the motion for summary judgment. *This is an action* brought by Isaac R. Price and others *in the form of a petitory action . . .* " (Record, Page 26.)

The Court below expressly (opinion of February 2, 1956) so characterized the suit, and treated it as such in its opinion of April 6, 1956.

The statutory law of Louisiana as relates to a petitory action is found in Articles 5, 43 and 44 of the Code of Practice, as follows:

"Art. 5. Petitory actions.—The petitory action is that by which he who has the property of a real estate, or of a right upon or growing out of it, proceeds against the person having the possession, in order to obtain the possession of the immovable property, or the enjoyment of the rights upon it, to which he is entitled."

"Art. 43. Parties defendant—Lessee's duty to declare name of lessor.—The petitory action, or one by which real property, or any immovable right to such property may be subjected, is claimed, must be brought against the person who is in actual possession of the immovable, even if the person having the possession be only the farmer or lessee.

But if the farmer or lessee of a real estate be sued for that cause of action, he must declare to the plaintiff the name and the residence of his lessor, who shall be made a party to the suit, if he reside in the State, or is represented therein, and who must defend it in the place of the tenant, who shall be discharged from the suit."

"Art. 44. Plaintiff required to prove title.—The plaintiff in an action of revendication must make out his title, otherwise the possessor, whoever he be, shall be discharged from the demand."

In interpreting Article 44, the Supreme Court of Louisiana, in the case of *Verdun* v. *Gilmore*, 128 La. 1063, 55 So 675, (1911) said:

"But it is only when a plaintiff, seeking to recover property from a party in possession, exhibits at least a better right than that of mere possession, that the question of the defendant's title need be inquired

into, *since there is no reason why the possession of one person should be disturbed at the instance of another, who shows no better right to such possession.* And that is, in effect, the language of the law, which reads:

> 'The plaintiff in an action of revendication must make out his title, otherwise the possessor, whoever he may be, shall be discharged from the demand. Code Prac, art. 44.' "

Thus it will be seen that Respondents are required to show a better *right to possession*, than petitioner, otherwise Respondents are not entitled to a judgment as relates to possession. From this it necessarily follows that if the *right to possession is vested in the State of Louisiana then Respondents are not entitled to a judgment.*

In order to determine that the State of Louisiana is in possession of the property and is entitled to the "right of possession" of the property, consideration need be given to the law of Louisiana relative to the "possessory action," and, that relative to the rights of a "possessor."

The provisions of our law on the possessory action, which are pertinent to this discussion, are Articles 46, 47, 48, 49, 53, 54 and 55 of the Code of Practice, which reads as follows:

> 46. Basis of action.—The possessory action, which is a branch of real actions, may be brought by any possessor of a real estate, or of a real right, who is disturbed either in the possession of the estate or

in the enjoyment of the right, against him who causes the disturbance, in order to be maintained in, or restored to the possession, whether he has been evicted or disturbed; provided his possession be accompanied by the qualifications hereafter required.

47. Parties plaintiff.—The possessors entitled to bring these actions are those who possess as owners.

Persons entitled to the usufruct or to the use of a real estate, and others having real rights growing from such real estate, may also bring their action, when disturbed in the enjoyment of their rights.

48. Persons holding possession in name of another not entitled to maintain action—Notice to landlord.—Those who possess in the name of another, such as tenants, are not entitled to the possessory action, when disturbed in the enjoyment of the real estate which they possess is that quality, or even when they are expelled; but they have their remedy against the person in whose name they possess, and they are bound to apprise him of the disturbance they have experienced, by personal notice, if he be within the State, and by advertisements in the newspapers, if he be out of the State, in order that he may quiet them if it can be done; otherwise they lose all right to claim damages from him, and will be liable to him besides for all the loss and damages which he may have sustained through their neglect.

49. Essential elements of possessory action.—In order that the possessor of a real estate, or one who claims a right to which such estate may be subjected, may be entitled to bring a possessory action, it is required:

1. That he should have had the real and actual possession of the property at the instant when the disturbance occurred; a mere civil or legal possession is not sufficient;

2. That he should have had that possession quietly and without interruption, by virtue of one of the titles prescribed in the forthy-seventh article, for more than a year previous to his being disturbed; provided the possession of less than one year be sufficient, in case the possessor should have been evicted by force or by fraud;

3. That he should have suffered a real disturbance either in fact or in law;

4. That he should have brought his suit, at the latest, within the year in which the disturbance took place.

When the possession of the plaintiff is accompanied with all those circumstances, it matters not whether he possesses in good or in bad faith, or even as a usurper, he shall nevertheless be entitled to his possessory action.

53. Proof of possession and disturbance thereof.—The plaintiff in a possessory action needs only, in order to make out his case, to prove that he was in possession of the property in question, in the manner required by this Code, and that he has been either disturbed or evicted within the year previous to his suit.

So that when the possession of the plaintiff, or the act of disturbing him is denied, no testimony shall be admitted, except as to the fact of the possession, or as to the act of disturbance, and all testimony relative to property shall be rejected.

54. Possessory action barred by petitory action.—If the possessor who has been disturbed in or evicted from his possession, bring a petitory action, that is to say, claim the ownership of the property, he shall not afterwards be entitled to the possessory, by dismissing the petitory action.

The same rule shall govern, if he sue at the same time for the possession and the ownership of the property; he shall then be considered as having renounced the possessory in order to resort to the petitory action.

55. Petitory and possessory actions—Joinder—Consent required.—Petitory and possessory actions shall not be cumulated or joined together except by consent of parties. But he who is sued in a possessory action may bring a petitory action for, or an action to establish title to, all or any part of the property involved in the possessory action, without in any way affecting the pending possessory action, provided that if the judgment be rendered in the petitory action in favor of plaintiff, the pending possessory action shall abate.

In connection with these Articles, aside from noting the manner in which they are complementary to those relating to petitory actions, or vice versa, from the standpoint of their relationship to the substantive rights of a "possessor" as found in the Civil Code, it should be noted generally, that in order to maintain the action, one must (1) possess as owner, (2) must have possessed for a year prior to the disturbance, (3) suit must have been instituted within a year of the

disturbance. The action is directed at the *protection* and *preservation of possession*, where it has been disturbed.

The substantive rights of a "possessor" are set forth in Articles 3426, 3435, 3436, 3438, 3449, 3450, 3454 and 3455 of the Civil Code, as follows:

3426. Definition.—Posssesion is the detention or enjoyment of a thing, which we hold or exercise by ourselves, or by another who keeps or exercises it in our name.

3435. Possession without ownership.—Although the possession be naturally linked with the ownership, yet they may subsist separately from each other; for it may happen that the actual possessor is not the true owner.

3436. Requisite of possession.—To be able to acquire possession of property, two distinct things are requisite:

1. The intention of possessing as owner.
2. The corporeal possession of the thing.

3438. Receipt of possession through others.—One may acquire possession of a thing, not only by himself, but also through others who receive it for him and in his name. But in this case it is necessary that the person receiving the possession should have had intention of receiving for the other.

3449. Loss against consent—Methods.—A possessor of an estate loses the possession against his consent:

1. When another expels him from it, whether by force in driving him away, or by usurping possession

during his absence, and preventing him from re-entering.

2. When the possessor of an estate allows it to be usurped and held for a year, without, during that time, having done any act of possession, or interfered with the usurper's possession.

3450. Possessors in general—Rights.—Although possession results frequently from a fact, and not from right, it nevertheless confers on the possessor certain rights with regard to the thing possessed, some of which are peculiar to the possessor in good faith, and the others are common to all possessors.

3454. Rights of possessors generally.—Rights, which are common to all possessors in good or bad faith, are:

1. That they are considered provisionally as owners of the thing which they possess, so long as it is not reclaimed by the true owner or person entitled to reclaim it, and, even after such reclamation, until the right of the person making it is established.

2. That every person who has possessed an estate for a year, or enjoys peaceably and without interruption a real right, and is disturbed in it, has an action against the disturber, either to be maintained in his possession, or to be restored to it, in case of eviction, whether by force or otherwise.

3. That such a possessor may, by prescription, acquire the property of the thing which he thus possesses, after a certain time, which is established by law according as he has possessed in good or bad faith.

3455. Action to maintain possession.—The action which a possessor for one year has against a person

disturbing his possession, to be maintained in it or restored to it, as is said in the preceding article, shall be decided before pronouncing on the question of ownership, and the real owner shall not be allowed to repel it by endeavoring to prove his right.

The foregoing demonstrates that the "possessor," i.e. one who has been in possession of property for one year, has substantial rights under the law of Louisiana. In fact, as respects the question of possession, his rights are superior to those of the owner, for Article 3455, supra, provides as respects the possessory action instituted by the possessor, that "the real owner shall not be allowed to repel it by endeavoring to prove his right (i.e. ownership)."

Thus it has been held that the possessor in a possessory action may also assert a claim of damages for the value of timber cut, *even as against the true owner*, Smith v. Grant Timber & Mfg. Co. 130 La. 471, 58 So. 153 (1912), where the Supreme Court said, page 474:

> "Finally, the defendant company contends that the *mere right of possession will not support an action for the recovery of the value of the timber removed;* that the only proper basis for such an action *would be the ownership of the timber;* that *such right of possession might suffice as against a mere trespasser, but not as against the true owner.*
>
> "To that effect is the common law. Jaggard on Torts, pp. 661, 668, 694, 706, 709, and 711. But not our Civil Code and Code of Practice. These provide as follows:

(Citing Articles 3450, 3454, and 3455 of the Civil Code, supra, and Articles 46, 53 and 55 of the Code of Practice, supra)

"It results from the foregoing that quiet undisturbed possession of real estate as owner for a year or more, whether in good or bad faith, invests the possessor with a right of possession which can serve as a basis for an action to be maintained in possession, or, if evicted, to be restored to possession; and that in such an action the question of title cannot be gone into at all. Now, if the question of title cannot be gone into, the legal situation is that for all the purposes of the suit the defendant company has no title—de non apparentibus et de non existentibus eadem est ratio. In other words, that the defendant company is not owner, and the plaintiff is not demanding anything of the owner, but simply to be restored to possession.

"Now, whether after the property has ceased to exist and restoration in natura become impossible, the right of action still survives in the form of an action for the value of the property, is a question not specifically covered by the above-transcribed codal provisions, but which this court has twice had occasion to consider, and to decide affirmatively. *Mott* v. *Hopper*, 116 La. 629, 40 South. 921; *Collins* v. *Clark*, 128 La. 250, 54 South. 788. The learned counsel for the defendant company vigorously assail the correctness of these decisions; but by any other conclusion the possessor who had illegally and wrongfully been deprived of his right would be left without a remedy, and the wrongdoer would profit by his own wrong; and, besides, there is no good reason why the value of the thing should not be made

to stand for the thing itself in such a case as is done in all other cases."

In the case of *Labarre* v. *Burton-Swartz Cypress Co.*, 126 La. 982, 53 So. 113, the Supreme Court said with reference to the right of the possessor generally, and particularly his right to intervene, as respects a suit involving possession, at page 985:

"Possession:

"The question at issue is primarily possession. The intervener alleges that he has possession under record (prior) title, and that his interest requires him to intervene and oppose both plaintiff and defendant; each claiming possession.

"*Possession is of more than ordinary importance.*

"Considered generally as a fact, it gives rise, when it is exercised in good faith, to a right to the fruits; it may be the basis of a prescriptive title, and other rights may grow out of it.

"In fine, it implies, in this case, the detention of the property and the enjoyment of a right.

" *It follows that the one in possession has great advantage.*

"If a contestation arises between two persons regarding an immovable property, the one in possession gains his cause, in the absence of proof of right as an owner.

"The following adage is expressive in regard to the right of the one who has the detention of the property:

" 'Actore non probante reus absolvitur,' which is only a concise and forcible expression of the right which the one in possession has.

"If plaintiff fails to prove his right, the defendant obtains judgment, although he has not proven anything.

"*Possession may be lost if the one in possession remains silent and acquiescent while others are contending for it, or at any rate his right of detention may be embarrassed, and he may be subjected to annoyance if he does not timely object, or object when an early opportunity presents itself for objecting.*

"If an intervener has an interest and has possession of the property, he is entitled to intervene in a suit in which plaintiff and defendant are contending for possession."

Turning to the question of the State's possession of the property in dispute in the case, in accordance with the requirement of Article 43 of the Code of Practice, supra, the suit was instituted against petitioner, who was in possession as a sublessee. In accordance with the requirements of this Article, petitioner answered, disclosing that it possessed, only as a sublessee, and not as owner, and disclosed the name of its lessor, saying:

". . .; that it acquired a mineral lease designated as State Lease #195 from Southern Sulphur Corporation by instrument dated September 18, 1936, . . ., which instrument conveys the rights of Southern Sulphur Corporation in Sections 22 and 27 aforesaid, among other property . . ." (Article XIII of Answer, Record, page.....).

This allegation shows that such possession as petitioner had since September 18, 1936, was in the capacity of a lessee. Nothing in the Record contradicts same. The Court below in footnote 3, pages 4 and 5 of its opinion dated April 6, 1956, gives a resume of the proof offered in support of the motion for summary judgment, and the only evidence showing *when* petitioner's *possession commenced*, were the reports, showing production from the abandoned oil wells for the year 1951, annexed to the certificate of T. M. Winefiele, Chief Engineer of the Department of Conservation. Clearly therefore, such possession as petitioner exercised, *was not as owner, but as lessee*, and in the name of another, i.e. the State of Louisiana. The proof further shows that this possession *was in excess of one year.*

The foregoing is not contraverted by the Court below. In disposing of petitioner's defense, under Article 43 of the Code of Practice, that it possessed only as a lessee, and therefore its lessor should be made a party to the suit, the Court below, attached much weight to the fact that petitioner *had disclaimed* any interest in the property, and "released its right under the lease." The Court stating:

> "The appelant's claim of error, . . . is predicated upon the assumption that a lessor-lessee relationship is present in this case. This is not so. True, *when the complaint was filed*, the appellant *had a right* to answer, claiming possession as a lessee, and thus to avail itself of the right provided by Art. 43, La. Code of Practice. . . . But the defendant *elected* not to

appear in this action as a lessee, but instead *denied possession*[1] and disclaimed any title to the property in question."

Thus the Court clearly recognized that the lessor-lessee relationship continued up to the time of the filing of the petition, thereby necessarily acknowledging that up until that time, such possession as petition had exercised with reference to the property, was *not as owner* but in the capacity of a *lessee.*

The Court below, in the case of *Lawrence* vs. *Sun Oil Co.*, supra, correctly stated the law of Louisiana, relative to possession by a lessee being the possession of the lessor, when it said at page 470:

". . . The lessee's possession of the property sued for is the possession of his lessor. *Allison* v. *Maroun*, supra. . . And as the lessor through his tenant is the real possessor, . . ."

The fact that the lessor is the real possessor, through his tenant, the lessee, derives in part from the following provisions of the Civil Code:

"3433. Constructive possession.—One may possess a thing not only by one's self, but also by other persons.

Thus the proprietor of a house or other tenement possesses by his tenant, or by his farmer; the minor,

[1] In actuality the defendant did not deny possession, but on the contrary denied "illegal" possession, and showed it was not in "actual physical possession" by virtue of the prior lessee-lessor relationship, and, its disclaimer of interest.

by his tutor; and, in general, every proprietor, by the persons who hold the thing in his name.

"3438. Receipt of possession through others.—One may acquire possession of a thing, not only by himself, but also through others who receive it for him and in his name. But in this case it is necessary that the person receiving the possession should have had intention of receiving for the other.

"3441. Possession held for another—Possessor barred from acquiring legal possession.—Those who possess, not for themselves, but in the name of another, as farmers, depositaries and others who acknowledge an owner, can not acquire the legal possession, because, at the commencement of their possession, they had not the intention of possession for themselves but for another."

The foregoing conclusively demonstrates that the State of Louisiana, as the lessor of petitioner, had been in possession of the property in dispute, through its lessee, in excess of one year, and at least up until the time petitioner disclaimed any interest, which was after suit was filed.

Therefore the proof in this case shows conclusively that the State of Louisiana was the "legal possessor" of this property. Being the legal possessor, it and it alone, was entitled to the undisturbed and exclusive possession thereof, even as against Respondents, assuming that Respondents were in fact the legal owners, and had a perfect title thereto.

While the Court below held that the lessor-lessee relationship, terminated with the execution of the dis-

claimer by petitioner after the suit was filed, still it did not characterize the continued possession by petitioner thereafter. While the State submits that the mere unilateral action by petitioner in disclaiming, could have no effect in changing the character of the continued possession thereafter, accepting the Court's decision on this score, still such possession would only be in the character of a trespasser.

However, the State being the legal possessor of the property, any such trespass by petitioner would be a violation of the State's rights, and an interference or disturbance of the State's possession. Respondents not being in possession, the State being the possessor, the State, and the State alone, has a cause of action to complain of such trespass. Respondents not being in possession, but on the contrary the State being the possessor, Respondents have no cause of action to complain of any trespass by petitioner.

The case of *Mass. and So. Construction Co.* v. *Cave Creek Township*, supra, held that the possessor of real property, even when such possessor has or makes no claim to the property, is a necessary and indispensable party to a suit to recover possession of the property. Here the evidence conclusively shows that the State, as a matter of law, has a claim to the property, and has acquired the rights and status of a possessor, and in fact is *the only* party entitled to the possession of said property, until such time as its possession is terminated (1) by a Court decree, or (2) by the continued

physical possession thereof for one year, by some third party.

That one out of possession of property may not maintain an action for trespass to property, was expressly held in the case *Linder* v. *Yazoo and M.V.R. Co.* 116 La. 262, 40 So. 697 (1906), where the Court said, at page 263:

> "Plaintiff does not allege that he has been in the real and actual possession of the property for one year or more and hence his suit is not the possessory action. Code Prac. art. 46 et seq.; Civ. Code, art. 3455. He alleges that the property belongs to him, and that the defendant railroad is in possession of it, and prays judgment for the money value of the property; hence his suit is petitory. Code Prac. art. 43. *True, he cumulates with his petitory action an action in trespass, which is a branch of the possessory action;* but that feature of the petition must be treated as mere surplusage, since the possessory and petitory actions cannot be combined in one petition, and where such a combination is attempted the possessory feature lapses and the petitory alone remains. Code Prac. art. 57 et seq."

To the same effect is the case of *Bossier's Heirs* v. *Jackson*, 114 La. 707, 38 So. 525, (1905 where the Supreme Court said:

> "If plaintiffs are in possession, then this action (trespass) lies; if they are not, it does not. It follows, if defendants are in possession, the petitory should be brought. . . .

With reference to trespass, there are averments that would go very far toward enabling parties plaintiff to sustain that action, although it is not strictly an action for trespass."

E. The Court Below Was in Error In Holding That Petitioner's Continued Possession Was Not In The Character Of A Lessee, And Further That Article 43 Of The Code Of Practice Only Applies Where The Lessor-Lessee Relationship Exists.

The Court below admtited that petitioner possessed as a lessee, at the time suit was filed. However, it held that petitioners disclaimer of interest, terminated this relationship, and, that Article 43 of Code of Practice, only applied where the lessee-lessor relationship existed, saying in part:

". . . It cannot be said that where defendants are not sued as and do not appear as lessees, that the rights granted by Art. 43 of the Louisiana Code of Practice can be availed of. . ."

While the doctrine of "interversion" of possession is recognized in Louisiana, the mere disclaimer by a lessee of any interest in the property is insufficient to meet the requirements of our law, to have an interversion of possession, *Cortinas* v. *Peters*, 224 La. 9, 68 So 2d 739, and the record is entirely barren of any evidence upon which the Court below could predicate a finding of the Civil Code, which read as follows:

The important thing under our law is the *origin* of one's possession, for it is the character of the possession

at its *origin*, which determines the character thereafter. This follows from Articles 3441, 3446, and 3433 of the Civil Code, which read as follows:

> 3441. Possession held for another—Possessor barred from acquiring legal possession.—Those who possess, not for themselves, but in the name of another, as farmers, depositaries and others who acknowledge an owner, can not acquire the legal possession, *because at the commencement of their possession*, they had not the intention of possession for themselves but for another.
>
> 3446. Possession obtained for another—Continuance of intention presumed.—Even if a person who commenced his possession of an estate for another, should entertain the intention of no longer holding for that other, but for himself, yet shall he still be presumed to hold possession for the person for whom he originally took it.
>
> 3433. Constructive possession.—One may possess a thing not only by one's self, but also by other persons.
>
> Thus the proprietor of a house or other tenement possesses by his tenant, or by his farmer; the minor, by his tutor; and in general, every proprietor, by the persons who hold the thing in his name.

Additionally, assuming that petitioner could change the *character of its possession* from that of a lessee, still the disclaimer executed by it, showed that it was *not* possessing as owner, thereby necessarily placing itself in the category of a "precarious" possessor, i.e. one who does not possess as owner. That Article 43 of the

Code of Practice does not apply to *all* precarious possessors, and not merely to a lessee, was held in the case of *Scott* v. *Bowles*, 3 La. Ann. 637, where the Supreme Court said:

"KING, J. This is a petitory action, instituted by the plaintiffs in the parish of Bossier, against the defendant, to recover a number of slaves, to which they assert title, and $800 for their hire. The defendant excepted to answering to the petition, averring that he had no title to, or possession of, the slaves claimed in the petition, in himself; that he possessed them as administrator of the succession of Seth Sheldon, deceased, which was opened in the parish of Caddo, where Sheldon had his domicile, and where the defendant resided. He denied the jurisdiction of the court, and prayed that the suit might be dismissed. The evidence established the facts as alleged in the exception; and further, that the slaves claimed were in the parish of Bossier, on a plantation belonging to Sheldon's succession, and had there been inventoried. The district judge dismissed the action, and the plaintiffs have appealed.

* * *

"This, being a petitory action, the plaintiffs were required, by express legislation, to institute it against the person in actual possession of the property claimed. If the party thus sued *disclaim* ownership, he must disclose the name and residence *of the owner, who is to be made a party to the suit.* C.P. art. 43. The court should have considered the exception of the defendant *only as a disclaimer of ownership or possession in his individual right*, and *a disclosure of the true character of his possession, and*

have permitted the plaintiffs to cite the defendant and his co-administrators in their representative capacities, to defend the action."

Thus the Court is in error when it says, at page 11 of its opinion of April 6, 1956:

". . . In all the cases cited by appellant in support of its claim that its "lessors" were indispensable parties to the suit, there was in existence an alleged lessor-lessee relationship."

The foregoing case demonstrates that the applicability of Article 43 of the Code of Practice is not restricted to lessees, but on the contrary applies to all "precarious" possessors, who do not possess *as owners*.

III. CONCLUSION

In the opinion of February 2, 1956, later withdrawn by the Court below, that Court appeared to be laboring under the erroneous belief that the State of Louisiana was attempting to take advantage of the State's immunity from suit, and hence there was no forum where Respondents could obtain relief, in settling their title controversy with the State. Such is not the case, for the State of Louisiana, in creating the State Mineral Board, has expressly made provision for suit against that agency, R.S. 30:121, and this statute has been interpreted to provide that a judgment against such agency is binding on the State. *State* v. *Texas Co.* 205 La. 417, 17 So. (2d) 569.

In bringing a title action, Respondents could have made the State of Louisiana, or its agency, a party

thereto, for they well knew the State was claiming ownership, by virtue of the two interpleader suits referred to at the outset. True the suit could not have been maintained in the Federal Court, but it could have been prosecuted in the State Court.

It is submitted that the foregoing demonstrates that the State of Louisiana is in possession of the property in dispute herein. Not only is the State in possession, but such possession had continued in excess of one year prior to the institution of this suit, and by virtue thereof, the State of Louisiana had acquired the status of a *legal possessor*, hence it, and it alone, is entitled to the undisturbed possession thereof, until such time as the true owner, if any, has successfully prosecuted a petitory action against the State of Louisiana.

Being the possessor thereof, it is an indispensible party to any suit which seeks to obtain possession, or which has for its object, the obtaining of possession of the property in dispute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I,....., Attorney General of the State of Louisiana hereby certify that copies of the foregoing brief have been served upon all counsel of record in said case, by depositing same in the U. S. Mail at Baton Rouge, La., in an envelope, duly addressed to the respective counsel at their address of record, and bearing the requisite amount of first class postage, on this.....day of July, 1956.

Attorney General of the
State of Louisiana.

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